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Supreme Court of the United States

October Term, 1970

No. 1098

GARFIELD & CO.,

Petitioner,

against

FANCIS J. WEST,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

GARFIELD & Co.,

Petitioner,

against

FRANCIS J. WIEST,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Garfield & Co. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment entered by the United States District Court for the Southern District of New York in favor of the respondent, Francis J. Wiest, and against petitioner, Garfield & Co., for $73,477.97, said judgment having been entered on an order of the Court denying petitioner's motion to vacate an arbitration award and granting respondent's motion to enter judgment on the award.

Opinions Below

The opinion of the District Court is reported at 308 F. Supp. 1107 (1970) and that of the Court of Appeals is not yet reported. Copies of these opinions are appended hereto at pages 1a-10a and 11a-20a, respectively.

Jurisdiction

The order of the Court of Appeals denying petitioner's petition for rehearing was entered on November 10, 1970. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

Questions Presented

1. There being an inconsistency between the arbitration provisions of the Constitution of the New York Stock Exchange and § 10 of the United States Arbitration Act as applied to the facts of this case, which controls?

2. Shall the principle established by this Court in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), be to a substantial extent nullified by requirements of advance waiver as a condition of membership in the New York Stock Exchange and similar organizations?

Statutes Involved

United States Arbitration Act § 10 provides that a United States court may vacate an arbitration award when it has been procured by "undue means" (subsection [a]), or when there has been "evident partiality . . . in the arbitrators" (subsection [b]). Petitioner invoked the jurisdiction of the District Court under § 10.

§ 28(b) of the Securities Exchange Act of 1934 (Title 15, U.S.C. § 78bb[b]):

> "Nothing in this Act (chapter) shall be construed to modify existing law (1) with the regard to the binding effect on any member of any exchange of any action taken by the authorities of such exchange to settle disputes between its members . . ."

§ 29(a) (§ 78cc[a]):

> "Any condition, stipulation or provision binding any person to waive compliance with any provision of this Act (chapter) . . . shall be void."

Statement of the Case

We adopt the following two paragraphs of the opinion of the Court of Appeals (12a):

"Petitioner-appellant Garfield is a member firm of the New York Stock Exchange (Exchange). It is a small firm with three general partners and one limited partner. Respondent-appellee had formerly been a partner in Garfield & Co. but resigned and joined another member of the Exchange, the firm of Spear, Leeds & Kellogg. The latter is a large firm and was a specialist in 61 stocks, some of which were quite actively traded, before Wiest joined the firm. Mr. Kellogg, the leading partner of the firm, is a former Chairman of the Board of Governors of the Exchange.

"The present dispute arose out of the above-mentioned change of firms by Wiest. Seeking his share of the proceeds of the transfer of an Exchange membership and certain salary and other amounts due him under the terms of the Garfield & Co. partnership agreement, Wiest sent the Arbitration Director of the Exchange a claim against Garfield for $75,719, exclusive of interest and costs. Garfield denied most of this liability and counterclaimed for $250,000 damages for the business expectancy in certain listed stocks in which Wiest had become the Exchange specialist by the use of funds allegedly provided by Garfield. The theory of the counterclaim was that there had been a conspiracy entered into between Wiest and Mr. Kellogg while Wiest was a partner in Garfield by which Wiest would leave Garfield and join Spear, Leeds &

Kellogg, taking with him the status of specialist in eight stocks."

In accordance with the requirements of the Constitution of the New York Stock Exchange, petitioner's partnership agreement provided that any dispute should be settled in New York by arbitration in accordance with the Constitution and Rules of the Exchange (13a).

The Constitution and Rules of the Exchange provided that arbitration should be before a panel of five members selected from a board appointed by the Chairman of the Board of Governors (13a-14a).

Article VIII, § 7 of the Constitution provided (14a):

> "The arbitrators in any case may at any time during the proceeding dismiss the proceeding and refer the parties to their remedies at law."

The first hearing was on March 7, 1968. The panel comprised five members of the Exchange (R.* 36a-37a). Counsel for the petitioner, concerned about the business dealings between the arbitrators and Spear, Leeds & Kellogg, particularly in the light of Mr. Kellogg's double status as alleged co-conspirator and former Chairman of the Board of Governors, were fearful that the panel would be prejudiced in respondent's favor. Although not alleging prejudice in so many words, counsel for the petitioner at the inception of the hearing moved that the arbitrators "refer the parties to their remedies at law" on the authority of Article VIII, § 7, and continued (5a; R. 11a):

> "First, a party of the other side, a partner of Mr. Wiest, a person whose conduct I shall feel called upon to criticize in the course of the proceedings, is a very well known member of the Exchange, Mr. Kellogg, former Chairman of the Board of Governors. Mr. Garfield, on the other hand, is

* R. citations are to petitioner's appendix in the Court of Appeals. No statement of fact so cited is in dispute.

> a relatively little known member of the Exchange and I doubt very much if any of you have had occasion to do business with him. On the other hand, I am sure that you all have had reason to do business, and perhaps regularly to do business, with Spear, Leeds & Kellogg, of which Mr. Kellogg is the leading partner."

The Chairman of the panel replied to counsel "to reassure" him that, in substance, "knowing one man is entirely familiar to the Arbitrators and I don't think any of them have favoritism on their consciences" (6a). No disclosure of business dealings was made. The arbitrators then denied the motion and the arbitration hearings proceeded through November 20, 1968. On December 19, 1968 the arbitrators made an award to the respondent to the extent of $68,925.29 and by a divided vote dismissed the counterclaim (15a; R. 18a).

Meanwhile, on November 18, 1968 this Court decided the *Commonwealth Coatings* case, 393 U.S. 145.

Petitioner then in January, 1969 filed a petition in the District Court to vacate the award on the ground that there had almost certainly been business dealings between the arbitrators' firms and Spear, Leeds & Kellogg, and that (R. 13a):

> "37. Upon information and belief, the Arbitrators herein were duty bound, especially upon the making of the motion described above, to disclose their respective business relations with the Kellogg firm of which respondent was a member. They failed or omitted to do so, or, on information and belief, believed that they were under no duty to do so. 38. Upon information and belief, that duty of the Arbitrators was disregarded in this arbitration."

Respondent cross-moved to confirm the award (12a).

The District Court denied the petition to vacate and granted the motion to confirm on procedural grounds rejected by the Court of Appeals (17a-18a).

The Decision of the Court of Appeals: § 10 Rights waived by joining the Exchange

The Court of Appeals affirmed the judgment (20a). The Court, differing from the District Court, found that petitioner had "properly and timely raised his objections under the circumstances and the then existing state of the law" (17a-18a).

The Court's affirmance went on the broad ground that objections to business dealings "were waived in advance by Garfield and by all other members of the Exchange." The Court recognized that "Exchange arbitrators would usually have more substantial contacts with large member firms than with small member firms. While we find rather unrealistic the Exchange's contention in its *amicus* brief that there is no possibility of favoritism by specialists, it would appear that any objections to arbitrators based upon their dealings through specialists are waived by member firms when they agree to Exchange arbitration; such dealings are contemplated by the parties when they join the Exchange" (18a-19a).

The Court did say, however, that in an Exchange arbitration an arbitrator would be "required to disclose any dealings he may have had with the party which were dealings *not* [emphasis in original] in the ordinary course of Exchange business" (20a).

The Court's misconception of petitioner's position. The Court apparently conceived that petitioner objects only to the arbitrators' failure to disclose a "particular type of transactions" *viz.* dealings in the ordinary course of business (16a). Petitioner objects to the arbitrators' failure to disclose any transactions, *supra* page 5. Petitioner makes "no claim that there were [other] dealings" (19a) because petitioner has no such evidence, but petitioner does not rule out that possibility. Mr. Kellogg undoubtedly en-

gages in dealings out of the regular course of business as petitioner knows to its sorrow. One of them was what the arbitration was about.

Reasons Relied on for the Allowance of the Writ

Petitioner submits that the decision of the Court below substantially nullifies the decision of this Court in *Commonwealth Coatings* not only by removing from its scope arbitrations required by the Constitution of the New York Stock Exchange irrespective of "impression of possible bias" and by the rules of all other trade associations with similar arbitration procedures, but also such arbitrations as may be held pursuant to contracts in which one of the parties by superior negotiating power, pressure, cajolery or otherwise has successfully inserted language purporting to waive or otherwise inconsistent with rights under § 10 of the Arbitration Act as construed by this Court.

Argument

In *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968), this Court, acting under the authority of § 10 of the Arbitration Act, vacated an arbitration award on the ground that nontrivial business dealings between a party and an arbitrator "create an impression of possible bias." By inference the Court held that such dealings showed "undue means" and "evident partiality" in the making of the award.

The Business Dealings Here Involved Most Decidedly "Create an Impression of Possible Bias."

At the time of the arbitration the firm of Spear, Leeds & Kellogg, were the specialists in, that is to say, had a prac-

tical monopoly in the dealings in 69 stocks,* nearly five per cent of all those listed on the Exchange, and including such active and important ones as Phelps Dodge, American Airlines, Boeing, Safeway Stores and Union Oil Co. of California (12a; R. 15a-17a).

Mr. Kellogg, leading partner in this firm and former Chairman of the Board of Governors, was, on petitioner's theory of the case, a co-conspirator with respondent in a breach of his fiduciary relationship with petitioner costing it $250,000 by reason of loss of prospective business (13a).

Some effort was made by the Exchange, in its *amicus* brief in the Court of Appeals, to depict the specialist as a mere clerk or automaton, without the capacity to do favors. This thesis was without support in the record.

On the contrary. The specialist is required by Rule 104 to maintain "insofar as reasonably practicable, . . . a fair and orderly market" and to "engage to a reasonable degree under existing circumstances in dealings for his own account when lack of price continuity, lack of depth or disparity between supply and demand exists or is reasonably to be anticipated."

Obviously the performance of these functions affords a wide discretion and therefore an opportunity for discrimination and favoritism difficult, if not impossible, to detect.

The Court of Appeals rightly said that the Exchange's contention "that there is no possiblity of favoritism" is "unrealistic" (18a).**

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* Including the eight brought by respondent.

** The alleged impossibility of favoritism was the principal argument of the Exchange. Neither respondent nor the Exchange urged the advance waiver theory.

The Tactics of Exchange Members are such that Statutes Requiring Fair Procedures Should be Strictly Enforced.

The President of the Exchange, Mr. Robert W. Haack, recently admitted that many members of the Exchange engage in sharp practices. As quoted in the public press, according to its President, "... many of [the Exchange's] own members indulged in 'intrigues and machinations' and 'mazes of blatant gimmickry' to bypass the rules and subvert the central market place when they spied a chance for a profit." Newsweek magazine, issue of November 30, 1970, page 72.

POINT I

It is peculiarly anomalous that a relevant statute forbidding "unfair means" and "evident partiality" should be held subordinated to provisions in the contracts of an institution which is the subject of a special statute intended to ensure that "fair procedures" and the "highest ethical standards" prevail in all its activities.

In *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), the Court, at page 350, quoted with approval from the House of Representatives report proposing the enactment of the Securities Exchange Act of 1934 to the effect that the Exchange is "*affected with the public interest* in the same degree as any other great utility." The Court then pointed out the evolution of the status of the Exchange from that of private club to public utility, saying at pages 350-351 that historically securities exchanges had been "treated by the court as private clubs [but that] as exchanges became more and more important in our Nation's economic and financial system, however, the private-club analogy became increasingly inapposite."

Continuing with the discussion of problems presented by the facts of *Silver*, viz., the revocation of the wire service of a non-member firm, the Court ruled that the scheme of self-regulation authorized by Congress by the statute "cannot be thought to have sanctioned and protected self-regulatory activity when carrier out in a fundamentally unfair manner" (page 364). The Court ruled that it was "essential" "that the highest ethical standards prevail as to every aspect of the Exchange's activities" (page 366).

In *Silver* the Court set aside the action of the Exchange because it had not been carried out according to "fair procedures" dictated by the "highest ethical standards."

Thus, applying the doctrine of *Silver* to the facts of this case, shall we understand that the Exchange's self-regulatory authority is to be deemed to "sanction" and "protect" an activity by which disputes are disposed of by "undue means" and "evident partiality"?

The theory of waiver adopted in this case would, in fact, if valid, have been equally applicable in *Silver*. The plaintiff in that action presumably knew, certainly he was on notice, that under the then existing rules of the Exchange his wire service could be summarily discontinued. That fact was not held to lessen his statutory right to "fair procedures."

In the present case a statute construed by this Court two years ago specifically commands "fair procedures"—yet the Court of Appeals, on the theory of advance waiver, fails to enforce petitioner's statutory right to a tribunal free from "impression of possible bias" at a moment when the President of the Exchange is publicly bewailing the "intrigues and machinations" and "mazes of blatant gimmickry" in which the members engage.

POINT II

When there is an inconsistency between a contract and a relevant statute, the statute controls. The party is not deemed to have waived his statutory rights by making the inconsistent contract.

As the Court of Appeals correctly said:

> "Under § 28(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(b), the arbitration procedures of the Exchange are subject to existing law, which of course includes the provisions of the Arbitration Act and, in particular, § 10 of that Act as interpreted by the Supreme Court."

Petitioner's membership in the Exchange and its own partnership agreement were New York contracts, and as such any provisions inconsistent with existing and applicable statutes were nugatory to the extent of the inconsistency.

In *People ex rel. City of New York* v. *Nixon*, 229 N.Y. 357 (1920), the Court considered the jurisdiction of the public service commission over the rate of fare provided in a municipal franchise contract with a traction company entered into at a time when New York law provided that rates should be "reasonable"; claiming that the stipulated rate of fare provided an insufficient return on the investment, the company's receiver applied to the commission for an increased fare. The City of New York moved to dismiss for want of jurisdiction, contending that the contract rate of fare conclusively governed. The Court, in an opinion by Cardozo, J., later a member of this Court, said (pages 361-362):

> "The obligation of a contract is determined by the law in force when it is made . . . Statutes then existing are read into the contract. They enter by implication into its terms. They do not change the obligation. They make it what it is. The statute

> which clothed the commission with jurisdiction to increase fares if found to be inadequate, was notice to municipalities that franchises thereafter granted must be coupled with the jurisdiction thus conferred . . . We have held that [the regulatory statute did not] nullify existing contracts. We are now asked to hold that the municipalities by their contracts may nullify existing statutes. We will not go so far."

The Court held that the statute controlled over the contract and that the commission had jurisdiction. It most definitely did *not* hold that the traction company had waived its rights to a reasonable return by making a contract for a particular rate of fare.

This Court reached the same result in a number of cases. *Southern Iowa Electric Co.* v. *Chariton*, 255 U.S. 539 (1921); *San Antonio* v. *Public Service Co.*, 255 U.S. 547 (1921); *Ortega Co.* v. *Triay*, 260 U.S. 103 (1922). The Court's headnote in *Ortega* correctly stated the holding of the case as follows (page 103):

> "A covenant to operate at a certain fare, made by the vendee in consideration of the sale of an electric railroad, cannot prevent a change of fare directed by public authority, acting in the public interest, under laws existing when the covenant was made."

There were many other cases of this type in both the state and federal courts when existing contract rates became unremunerative because of the rise in prices following the First World War. In none was it held that statutory rights were waived by making an inconsistent contract.

POINT III

Not only are advance waivers of statutory rights invalid as a matter of contract law, but in this instance § 29(a) of the Securities Exchange Act specifically invalidates waivers of rights granted by the Act.

As this Court said in *Brooklyn Savings Bank* v. *O'Neill*, 324 U.S. 697, 704 (1945):

> "It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy."

A waiver of damages for failure to receive minimum wages was there held void as contravening the statutory policy.

Thus advance waivers of the statute of limitations, of an infant's right to invalidate his contract or of a contracting party's right to challenge a contract for fraud or duress are all void. 6A Corbin, *Contracts* (1960 ed.), § 1515. In *Pope Manufacturing Co.* v. *Gormully*, 144 U.S. 224 (1892), this Court held invalid the waiver by a patent licensee of his right to plead the invalidity of the patent if sued for infringement.

In this case § 29(a) of the Securities Exchange Act of 1934, *supra* page 3, forbids any "provision binding any person to waive compliance with any provision of this Act."

By § 28(b) of the Act, *supra* page 3, the Arbitration Act is in substance absorbed into the Securities Exchange Act of 1934—as the Court of Appeals noted in the passage quoted *supra* page 11. Thus the waiver is void under the Securities Exchange Act of 1934.

This Court reached an analogous conclusion as regards an alleged waiver of arbitration under the corresponding and identically phrased provision of the Securities Act of 1933. *Wilko* v. *Swan*, 346 U.S. 427 (1953).

Conclusion

The Court of Appeals has, petitioner submits, again adopted the private club approach to the affairs of the New York Stock Exchange and has, we believe, erroneously carved out an enormous exception to this Court's construction of § 10 of the Arbitration Act.

This Court should grant a writ of certiorari, reverse the judgment of the Court of Appeals and direct that the arbitrators be required to disclose all their dealings with Spear, Leeds & Kellogg.

Respectfully submitted,

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New York
December 8, 1970

(APPENDIX)

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

69 Civ. 264

In the Matter of the Arbitration between
GARFIELD & Co.,

Petitioner,

and

FRANCIS J. WIEST,

Respondent.

Appearances:

BAKER, NELSON, WILLIAMS & MITCHELL, Attorneys for Petitioner, 20 Exchange Place, New York, New York 10005, C. DICKERMAN WILLIAMS, LESLIE KIRSCH, of Counsel.

GRANDFIELD & GOODMAN, Attorneys for Respondent, 15 William Street, New York, New York 10005, MORTIMER GOODMAN, of Counsel.

MILBANK, TWEED, HADLEY & MCCLOY, Attorneys for *amicus curiae* New York Stock Exchange, 1 Chase Manhattan Plaza, New York, New York 10005, ANDREW J. CONNICK, of Counsel.

McGOHEY, *D.J.*

The petitioner, a member firm of the New York Stock Exchange, moved purusant to the Arbitration Act[1] to

[1] 9 U.S.C. § 6.

vacate an award made in an arbitration between it and a former general partner, also a member of the Exchange. The respondent opposed on jurisdictional and other grounds and later, while the motion was under consideration, moved on jurisdictional grounds for remand to the New York Supreme Court, or in the alternative for entry of judgment on the award. Both motions are here considered. The Exchange, with leave of the court, filed an amicus brief and argued in opposition to the petition and in support of the award. The petitioner's motion is denied. The respondent's motion for judgment is granted.

The arbitration involved the respondent's claim for money allegedly due him upon his withdrawl from the petitioner and the latter's counterclaim for damages resulting from the respondent's alleged disloyalty in violation of the parties' partnership agreement. The arbitrators awarded the respondent $68,965.29, assessed $600 costs against the petitioner and dismissed its counterclaim. The petition alleges the award was procured by "undue means" or "evident partiality" in the arbitrators.[2]

The petitioner is a limited partnership organized under New York law. It consists of three general partners and one limited partner. The general partners are all citizens of New Jersey.[3] The respondent is a citizen of New York. The amount in controversy exceeds $10,000 exclusive of interest and costs.

The fourth article of the partnership agreement provides: "The copartnership shall conduct a business of general brokerage in stocks, bonds and other securities

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[2] Id. § 10.

[3] Respondent's Ex. 1, p. 2. This exhibit shows the limited partner also is a citizen of New Jersey although that is immaterial since the object of this proceeding is not "to enforce a limited partner's right against or liability to the partnership." New York Partnership Law § 115; Colonial Realty Corporation v. Bache & Co., 358 F.2d 178, 183-4 (2d Cir. 1966).

and in commodities usually traded or dealt in on National Exchanges and in the over the counter markets, and in the purchase, sale, investment and dealing in stocks, bonds and other securities and in commodities and in acting as specialists on National Exchanges; and, in general the copartnership shall engage in such business as is usually conducted by Exchange brokers, securities dealers and Exchange specialists in the City of New York and whereever else the firm hereafter do business."[4] The twenty-fifth article of the partnership agreement provides: "Any controversy or claim arising out of, or relating to, this agreement or the breach thereof, or to any matter in connection therewith, shall be settled in New York City by arbitration in accordance with the Constitution and Rules then obtaining of the New York Stock Exchange, and judgment upon the award rendered may be entered in the highest court of the forum, State or Federal, having jurisdiction."[5] The business described in the fourth article which the parties carried on for more than six years certainly involved interstate commerce[6] and it is clear that, "at the time [the parties] entered into [the partnership agreement] and accepted the arbitration clause, they *contemplated* substantial interstate activity."[7] The controversy between them arose out of that agreement and therefore is within the terms of the Arbitration Act.[8]

The court has jurisdiction.

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[4] Petitioner's Ex. A, p. 2.

[5] Petitioner's Ex. T, p. 15.

[6] 15 U.S.C. § 78b. See also U.S. v. Re, 336 F.2d 306, 315 (2d Cir.), cert. denied, 379 U.S. 904 (1964).

[7] Metro Industrial Painting Corp. v. Terminal Construction Co., Inc., 287 F.2d 382, 387 (2d Cir. 1961) (Lumbard, Chief Judge, concurring).

[8] 9 U.S.C. §§ 1, 2.

The arbitration was conducted in accordance with the Constitution and Rules of the Exchange which requires that controversies between members be submitted for arbitration by five members of the Board of Arbitrators of the Exchange. This board consists of fifteen members of the Exchange appointed after each annual election by the Chairman of the Board of Governors, subject to that board's approval.

Prior to the respondent's withdrawal from the petitioner he was its floor specialist in a small number of securities. Shortly after his withdrawal he became a partner and floor specialist of Spear, Leeds and Kellogg, a prominent member firm whose members or representatives are floor specialists in a large number of securities. James C. Kellogg of that firm was, at some unspecified prior time, Chairman of the Board of Governors of the Exchange. It was not shown nor indeed was it contended that he appointed any of the arbitrators who sat in this case to the Board of Arbitrators or that he or anyone in his firm or on his behalf caused any of them to be so appointed; or to be chosen to serve in this case. Those who served here appear to have been chosen to do so by the Arbitration Director of the Exchange who was neither alleged nor shown to have been appointed by or otherwise associated with Mr. Kellogg. As far as appears, the Director first disclosed the names and firms of the panel members to the parties in the notice of the first hearing which he gave them about two weeks before the appointed date. The notice contained the following statement: "Should any party or counsel believe an arbitrator disqualified for any cause, he should notify the Arbitration Director at once."[9] The notice was accompanied by a document entitled Arbitration Procedures Pamphlet which contained the following provision: "Upon receipt of the notice, a party may challenge

[9] Respondent's Ex. IV, p. 2.

any arbitrator for cause by written notice to the Arbitration Director. If the challenge is sustained by the Arbitration Director, another arbitrator will be chosen as a replacement."[10] Neither party challenged an arbitrator either in writing or otherwise in the period between receipt of the notice and the first hearing.

At the start of the first session the petitioner's counsel moved the arbitrators orally on two grounds to dismiss the proceeding and remit the parties to their demedies at law, pursuant to the following provision in Section 7 of Article VIII of the Exchange's Constitution: "The arbitrators in any case may at any time during the proceedings, and shall upon the joint request of the parties thereto, dismiss the proceedings and refer the parties to their remedies at law."[11] The respondent did not join in the motion. Counsel for the petitioner stated his first ground as follows:

> "a party of the other side, a partner of Mr. Wiest, a person whose conduct I shall feel called upon to criticize in the course of the proceedings, is a very well known member of the Exchange, Mr. Kellogg, former Chairman of the Board of Governors. Mr. Garfield, on the other hand, is a relatively little known member of the Exchange and I doubt very much if any of you have had occasion to do business with him. On the other hand, I am sure that you all have had occasion to do business, and perhaps regularly do business, with Spear, Leeds & Kellogg, of which Mr. Kellogg is the leading partner.
>
> "I do not want to seem to reflect upon your fairness and the honesty and the confidence with which you will approach the issues in this case but I do suggest, however, under such circumstances as exist here, it is a kind of embarrassment dealing, on the one side, with a person one knows, with one whose

[10] Respondent's Ex. V, p. 7.

[11] Respondent's Ex. II, p. 3.

> firm does business with and, on the other hand, a person of whom one knows very little, perhaps have never known of at all until this proceeding came along."[12]

The second ground of the motion was that the controversy involved legal principles whose application although "relatively simple for a court of law might prove to be difficult for [the arbitrators.]" The only arbitrator who commented on the motion was the panel chairman who said: "On behalf of the Arbitrators, I am going to take enough time to assure you that the position to which you referred of knowing one man is entirely familiar to the Arbitrators and I don't think any of them have favoritism on their con sciences. I say that just to reassure you."[13] The arbitrators then went into executive session after which the chairman announced their denial of the motion. The proceeding was later concluded after several hearings without further challenge to the arbitrators.

The petitioner has not charged either corruption or actual bias in the arbitrators. Its contention on this motion is, rather, that the award must be vacated because, although the matter was brought to their attention by the motion just described, "the respective Arbitrators did not disclose to the petitioner their business dealings with the Kellogg firm, though any such dealings, in the nature of things, were known to the Kellogg firm of which respondent was a member."[14] *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*[15] on which the petitioner relies was decided eight months before the instant arbitration hearings commenced and one month before the challenged

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[12] Petition, pp. 9-10, par. 34.

[13] Answer, pp. 6-7, par. Seventeenth.

[14] Petition, p. 11, par. 36.

[15] 393 U.S. 145 (1968).

award was made. As far as appears it was not brought to the arbitrators' attention prior to the award.

Commonwealth involved a proceeding under the Arbitration Act in which the parties were a painting subcontractor and the sureties of the prime contractor on a large building construction project in Puerto Rico. The subcontract contained an arbitration clause pursuant to which each party designated one arbitrator and these two selected a third. Although the prime contractor was a "regular customer" of the third arbitrator, having employed him from time to time as an engineering consultant and paid him fees of approximately $12,000 over a period of four or five years, these facts were unkown to Commonwealth "and were never revealed to it by this arbitrator, by the prime contractor, *or by anyone else* (emphasis supplied) until after the award had been made." [16] Commonwealth's motion to vacate the award on the ground, among others, of the arbitrator's failure to disclose his business relationship with the prime contractor was denied by the District Court and the Court of Appeals for the First Circuit affirmed.[17] Both courts found there was no "prejudice or bias in fact manifested in the course of the proceedings," [18] a claim which Commonwealth asserted in those courts but abandoned in the Supreme Court.[19] While the Court of Appeals thought "it would have been far better if there had been disclosure" it was unable to "say that the relationship was sufficiently close to establish 'evident partiality' within the statute as a matter of law." [20]

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[16] 393 U.S. 146.

[17] 382 F.2d 1010 (1 Cir. 1967).

[18] Id. 1012.

[19] 393 U.S. 147.

[20] 382 F.2d 1012.

The Supreme Court rejected the lower court's construction of the statute and reversed. It had no doubt that "if a litigant could show that a foreman of a jury or a judge in a court of justice had, *unknown to the litigant* (emphasis supplied), any such relationship, the judgment would be subject to challenge" [21] in light of the court's decision in *Tumey* v. *Ohio.*[22] The Supreme Court there reversed, as a denial of due process, a criminal conviction by a village mayor because the only compensation he received for his judicial services consisted of the statutory fees, amounting to about $100 a month,[23] he assessed against those he convicted. The *Commonwealth* court could "see no basis for refusing to find the same concept [embodied in this application of the constitutional principle to courts] in the broad statutory language that governs arbitration proceedings and provides that an award can be set aside on the basis of 'evident partiality' or the use of 'undue means'." [24] It held the failure of both the arbitrator and the prime contractor to give Commonwealth "even an intimation" of their close financial relations, a "manifest violation of the strict morality and fairness Congress would have expected [on their part]" [25] and ruled that "arbitrators [should] disclose to the parties any dealings that might create an impression of possible bias." [26]

The facts here are substantially and materially different from those in Commonwealth. While the instant petition charging, on information and belief (par. 32),

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[21] 393 U.S. 148.

[22] 273 U.S. 510 (1927).

[23] Id. at 532.

[24] 393 U.S. 148.

[25] Id. at 147-148.

[26] Id. at 149.

that the "members of both the Board and the panel of arbitrators . . . or their firms, regularly conducted business with the Kellogg firm of which respondent was a partner in amounts *more than trivial*[27] in securities [in which Wiest and the Kellogg firm were specialists] both before and during the arbitration," (emphasis supplied) was not filed until after the award, it is not and indeed could not be contended that the "information" was acquired and the "belief" formed only *after* the award. As already noted, the petition (par. 34) shows that when the parties first appeared before the arbitrators, the petitioner's counsel was "*sure*" that all of the latter had "had occasion to do business, and perhaps regularly do business with Spear, Leeds and Kellogg. . . ." (emphasis supplied). Accordingly, that there had been in the past and currently were, "more than trivial" business relations between the arbitrators and the Kellogg firm, was thus known to Garfield & Co. at that time at least, and it is to the last degree improbable that it lacked this knowledge two weeks earlier when the names of the members of the panel appointed by the Arbitration Director were disclosed to it. Although the petitioner had sufficient information on which to base a challenge, it did not file one with the Arbitration Director before the hearings commenced, as it was entitled and indeed invited to do. Significantly, even the motion it made at the first hearing did not challenge any arbitrator's integrity or seek his disqualification by reason of possible interest. On the contrary, counsel specifically disclaimed any purpose "to reflect upon [their] fairness and . . . honesty." He was clearly concerned, as the second ground of his motion shows, to have the controversy tried by a court rather than arbitra-

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[27] The phrase appears to have been taken from Justice White's concurring opinion in Commonwealth in which Justice Marshall joined, 393 U.S. 151-152.

tors. Accordingly, it seems clear and this court finds that, while unwilling to challenge any of them, he hoped to persuade all of them to remit the controversy to the State Court in order to spare themselves any embarrassment they might experience if they should have to decide against a member of the Kellogg firm. In view of counsel's sophisticated statement, it would have been the merest formalism for the arbitrators to respond to his argument by repeating to him the facts he had just recited about their business relations with that firm; facts which they, by not denying, in effect admitted. They did not, it is true, disclose the number or dollar value of their respective dealings with the Kellogg firm but, in the circumstances, such detail was by no means essential for a legally sufficient challenge. The petitioner, although sufficiently informed to be able to do so, chose, for its own reasons, not to make any challenge. Now that it has lost in the arbitration, it should not be heard to claim that the arbitrators' conduct denied it the opportunity to make what we find to have been a free and informed choice.

The respondent's motion to dismiss for lack of jurisdiction is denied and it is So Ordered.

The petitioner's motion to vacate the award is denied and it is So Ordered.

The respondent's motion for entry of judgment on the award is granted and judgment may be entered accordingly.

It is So Ordered.

Dated: New York, N. Y.,
January 16, 1970.

JOHN F. X. McGOHEY
U. S. D. J.

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 22—September Term, 1970.

(Argued September 16, 1970—Decided October 20, 1970.)

Docket No. 34552

In the Matter of the Arbitration Between
GARFIELD & Co.,
Petitioner-Appellant,
and

FRANCIS J. WIEST,
Respondent-Appellee.

Before:
WATERMAN, MOORE and KAUFMAN, *Circuit Judges.*

Appellant seeks reversal of (1) an order of the United States District Court for the Southern District of New York, McGohey, *J.*, denying its petition to vacate an arbitration award made against it and (2) a judgment by the same court confirming the arbitration award for appellee. Affirmed.

C. Dickerman Williams, Leslie Kirsch, Baker, Nelson, Williams & Mitchell, New York City, *for Appellant.*

Mortimer Goodman, Grandefeld & Goodman, New York City, *for Appellee.*

Andrew J. Connick, Milbank, Tweed, Hadley & McCloy, New York City, *for amicus curiae New York Stock Exchange.*

Waterman, *Circuit Judge*:

These are appeals from (1) an order of the United States District Court for the Southern District of New York denying the petition of Garfield & Co. (Garfield) to vacate an arbitration award made against it, and (2) a judgment by the same court in favor of the cross-petitioner, Francis J. Wiest, and against cross-respondent Garfield for $73,447.95. The judgment and order were made on an opinion by McGohey, *J.*, reported in 308 F.Supp. 1107 (1970).

Petitioner-appellant Garfield is a member firm of the New York Stock Exchange (Exchange). It is a small firm with three general partners and one limited partner. Respondent-appellee had formerly been a partner in Garfield & Co. but resigned and joined another member of the Exchange, the firm of Spear, Leeds & Kellogg. The latter is a large firm and was a specialist in 61 stocks, some of which were quite actively traded, before Wiest joined the firm. Mr. Kellogg, the leading partner of the firm, is a former Chairman of the Board of Governors of the Exchange.

The present dispute arose out of the above-mentioned change of firms by Wiest. Seeking his share of the proceeds of the transfer of an Exchange membership and certain salary and other amounts due him under the terms

of the Garfield & Co. partnership agreement, Wiest sent the Arbitration Director of the Exchange a claim against Garfield for $75,719, exclusive of interest and costs. Garfield denied most of this liability and counterclaimed for $250,000 damages for the business expectancy in certain listed stocks in which Wiest had become the Exchange specialist by the use of funds allegedly provided by Garfield. The theory of the counterclaim was that there had been a conspiracy entered into between Wiest and Mr. Kellogg while Wiest was a partner in Garfield by which Wiest would leave Garfield and join Spear, Leeds & Kellogg, taking with him the status of specialist in eight stocks.

Under the Exchange Constitution and Rules and the Garfield partnership agreement there were clearly defined arbitration procedures. The Garfield partnership agreement provided in part:

> Any controversy or claim arising out of, or relating to, this agreement . . . shall be settled in New York City by arbitration in accordance with the Constitution and Rules then obtaining of the New York Stock Exchange. . . .

Article VIII, Section 5, of the Exchange Constitution provides:

> Any controversy between parties who are members, allied members, member firms or member corporations shall be submitted for arbitration to five Arbitrators, members of the Board of Arbitration provided for by Section 4 of this Article, and the decision of a majority of such Arbitrators shall be final. All such proceedings shall be held in the City of New York.

Article VIII, Section 4, provides in pertinent part:

> Promptly after the annual election of the Exchange, the Chairman of the Board of Governors

> shall appoint, subject to the approval of the Board of Governors, a Board of Arbitration to be composed of fifteen arbitrators selected from members and allied members of the Exchange who are not members of the Board of Governors, to serve at the pleasure of the Board of Governors or until the next annual election of the Exchange and their successors are appointed and take office.

The Arbitrations Director selects five members of this Board as a panel for any particular arbitration. Article VIII, Section 7, provides in part:

> The Arbitrators in any case may at any time during the proceedings, . . . dismiss the proceedings and refer the parties to their remedies at law. . . .

The Arbitration Procedures Pamphlet, distributed to the parties, states:

> Upon receipt of the notice [giving the names and addresses of the arbitrators and the date, time and place of the hearing], a party may challenge any arbitrator for cause by written notice to the Arbitration Director. If the challenge is sustained by the Arbitration Director, another arbitrator will be chosen as a replacement.

The Procedures Pamphlet specifically stated that "[i]t neither interprets the relevant portions of the Constitution and Rules nor is a substitute therefor."

As noted above, Wiest initiated the arbitration proceeding by filing a statement of claim with the Arbitration Director. Garfield filed an answer including the counterclaim, and the parties signed a submission agreement for an arbitration to be conducted in accordance with the Exchange Constitution and Rules. After the parties had submitted statements of their respective claims to the Arbitration

Director, he sent them the notice (mentioned in the Procedures Pamphlet above) setting the hearing for March 7, 1968 and enclosed a copy of the Procedures Pamphlet. Garfield received this notice during the last week of February 1968. At no time did Garfield challenge any of the arbitrators for cause under the above quoted passage of the Procedures Pamphlet. Instead, at the opening of the arbitration hearing Garfield made a motion to have the arbitrators dismiss the proceedings and remit the parties to their remedies at law under the provisions of Article VIII, Section 7, of the Exchange Constitution. The primary ground for this motion was that the arbitrators might be embarrassed in deciding a case in which the firm of Spear, Leeds & Kellogg (Mr. Kellogg in particular), a firm with which the arbitrators presumably did substantial business, would be severely criticized by a relatively small and unknown firm. After assurances by the chairman of the panel about lack of bias, the motion was denied and the hearings began. The hearings continued through November 20, 1968 and, on December 19, 1968, the arbitrators made an award in Wiest's favor.

On November 18, 1968, while this case was being presented to the arbitrators, the Supreme Court handed down its decision in *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968), that an arbitration award must be vacated under § 10 of the Arbitration Act, 9 U.S.C. § 10,[1] where a "neutral" arbitrator had failed to disclose

[1] 9 U.S.C. § 10 provides in pertinent part:

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

substantial dealings with one of the parties. In January 1969 Garfield, relying upon the holding of *Commonwealth Coatings*, filed a petition in the district court below to vacate the award. In August 1969 Wiest filed a petition in the Supreme Court, New York County, to confirm the award in his favor. Garfield removed Wiest's state court petition to the district court, and Wiest sought a remand back to the state court or, alternatively, a confirmation of the award by the district court. In January 1970 the order and judgment mentioned at the beginning of this opinion were entered, and Garfield filed this appeal.

Garfield contends that *Commonwealth Coatings* is fully applicable to Exchange arbitration; that it timely raised at the commencement of the arbitration hearings its objection to continuing before the arbitration panel; and that the award should be vacated because the arbitrators did not disclose their almost certain dealings with Spear, Leeds & Kellogg, and with Mr. Kellogg. While we do not fully disagree with all of appellant's contentions, we affirm on the ground that, in the context of Exchange arbitration, the particular type of transactions to which Garfield objects need not be disclosed.

In *Commonwealth Coatings* the parties, under the contract giving rise to the dispute therein, had agreed to submit any controversies to arbitration. Pursuant to this agreement each party appointed an arbitrator, and these two together selected a third, supposedly neutral, arbitrator. Unknown to the petitioner in that case, the third arbitrator, in his business as an engineering consultant, had done significant and repeated business with the other party. This relationship between the arbitrator and the other party was not discovered by the petitioner until after an award was made. The aggrieved party sought vacation of the award in federal court under § 10 of the Arbitration Act, and relief was denied by both the district

court and the court of appeals. The Supreme Court reversed despite the fact that the arbitration award had been unanimous and no claim had been made at any time that there had been any actual partiality, unfairness, bias, or fraud. 393 U.S. at 152 (dissenting opinion of Fortas, J.), and see lower court opinion, 382 F.2d 1010, 1012 (1 Cir. 1967).

Initially we must consider whether Garfield's objections to the arbitration panel were properly and timely raised. It is well settled that disgruntled losers cannot first raise their objections after an award has been made. *Ilios Shipping Corp.* v. *American Anthracite Corp.*, 148 F. Supp. 698 (SDNY 1957), *aff'd*, 245 F.2d 873 (2 Cir. 1957); *San Carlo Opera Co.* v. *Conley*, 72 F. Supp. 825, 833 (SDNY 1946), *aff'd*, 163 F.2d 310 (2 Cir. 1947). Here Garfield did not challenge any of the arbitrators for cause as provided in the Arbitration Procedures Pamphlet but instead made a motion under Article VIII, Section 7, of the Exchange Constitution for the arbitrators to remit the parties to their legal remedies. Garfield urges that the provision for challenges for cause in the Procedures Pamphlet was nugatory in that such challenges were not provided for in the Exchange Constitution and Rules. Without passing on this contention we do accept Garfield's second argument that, under the then existing law, business dealings with the parties were not deemed cause for challenge. *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145, 153 (1968) (dissenting opinion of Fortas, J.); *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 382 F.2d 1010 (1 Cir. 1967); *Ilios Shipping Corp.* v. *American Anthracite Corp.*, *supra* at 700; *Stiers Bros.* v. *Broderick*, 60 F. Supp. 792, 799 (D. Kan. 1945); *Astoria Medical Group* v. *Health Insurance Plan*, 11 N.Y.2d 128, 136, 13[illegible] (1962), and hence that Garfield should not be faulted for failure to make a challenge for cause. Contrary to the opinion below, we find that Garfield's motion at the begin-

ning of the arbitration hearing properly and timely raised its objections under the circumstances and the then existing state of the law. Needless to say, a more specific objection would be required after the *Commonwealth Coatings* decision, but on these facts Garfield cannot be held to a precise prediction of future case law.

Returning to the merits, *Commonwealth Coatings* teaches that when parties agree to arbitration, the arbitrators, in order to avoid even the appearance of bias, must disclose any nontrivial dealings with one party which are not known to the other party. A necessary corollary is that, once disclosure has been made, the arbitrator may be challenger for cause if the dealings are nontrivial. The obverse of this last proposition is that when such challenges are waived in advance by the parties as to certain transactions, arbitrators are not required to disclose participation in such transactions.

In the present case Garfield urges that since the arbitrators did not reveal the exact extent of their dealings with Spear, Leeds & Kellogg in those stocks in which the latter were specialists and did not reveal dealings with Mr. Kellogg as a former Chairman of the Board of Governors, there was no proper disclosure. We disagree for we find that such objections were waived in advance by Garfield and by all other members of the Exchange.

Garfield, when becoming a member firm of the Exchange, agreed to the arbitration of disputes according to the Exchange Constitution and Rules. The selection of the arbitration panels was known to it, and it most certainly knew that any arbitrators, by their very connection with the Exchange, would, in the ordinary course of business, have dealings with specialists, and that Exchange arbitrators would usually have more substantial contacts with large member firms than with smaller member firms. While we find rather unrealistic the Exchange's contention in its *amicus* brief that there is no possibility of favoritism by

specialists, it would appear that any objections to arbitrators based upon their dealings through specialists are waived by member firms when they agree to Exchange arbitration; such dealings are contemplated by the parties when they join the Exchange. In *Commonwealth Coatings* the parties agreed to the selection of a neutral third arbitrator, one without any nontrivial connections with either party; in the present case Garfield agreed to arbitration before a panel of arbitrators who almost necessarily will have had dealings in the ordinary course of Exchange business with any potential opposing party who is also a member of the Exchange.

Similarly, when becoming an Exchange member, Garfield knew that if it should ever become involved in a dispute that concerned a former Chairman of the Board of Governors, it would be probable that the arbitrators might have had some dealings with the former Chairman. Although Garfield points to the provisions in Article VIII, Section 7, authorizing the arbitrators to remit the parties to their legal remedies, Garfield is not objecting so much to the qualifications of the arbitrators as to their likely business connections with its opponent. While we do not pretend to interpret Article VIII, Section 7, we do think that the provision must have been intended to give an alternative remedy, not because of the connections of a party, but because of the possible legal difficulties in the issues of a particular case or because of individual disqualifications of the arbitrators, neither of which appear to be present in this case. Otherwise, disputes involving certain of the larger, or more active, or more specialized, firms would be routinely remitted to the courts.

Inasmuch as Garfield has made no claim that there were dealings between the arbitrators and Spear, Leeds & Kellogg or Mr. Kellogg other than in the ordinary course of Exchange business, *Commonwealth Coatings* does not require the vacation of the award in this case. However,

we wish to emphasize that we do not hold that Exchange arbitration is exempt from the holding in *Commonwealth Coatings* insofar as an arbitrator is required to disclose any dealings he may have had with a party which were dealings *not* in the ordinary course of Exchange business. Under § 28(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(b), the arbitration procedures of the Exchange are subject to existing law, which of course includes the provisions of the Arbitration Act and, in particular, § 10 of that Act as interpreted by the Supreme Court. In this opinion we are only holding that, when parties have agreed to arbitration with full awareness that there will have been certain, almost necessary, dealings between a potential arbitrator and one of the opposing parties, disclosure of these dealings is not required by *Commonwealth Coatings* inasmuch as the parties are deemed to have waived any objections based on these dealings.

The order and judgment of the district court are affirmed.

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Supreme Court of the United States

October Term, 1970

No. 1098

GARFIELD & CO.,

Petitioner,

against

FRANCIS J. WIEST,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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Cases Cited

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Supreme Court of the United States

OCTOBER TERM, 1970

No. 1098

GARFIELD & CO.,

Petitioner,

against

FRANCIS J. WIEST,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Preliminary Statement

Petitioner has at page 2 of its petition substantially changed the issue from that presented in its brief to the Circuit Court (pp. 3-5, Appellant's Brief). In its attempt to becloud the simple issue before the District Court, the Circuit Court and now this Court, petitioner has resorted to quoting unsubstantiated statements from a popular news magazine obviously only a part of the news article and an excerpt of a long speech. The statement at page 9 of the petition is completely irrelevant to the issue at bar. Petitioner has gone outside the record in the Courts below. Such procedure should not be tolerated.

Petitioner has also attempted to raise the question of alleged waiver in a context not germane to the facts of this case.

The sole question here is as it has been in the Courts below:

Can petitioner, a member firm of the New York Stock Exchange with full knowledge of the workings of the New York Stock Exchange and of possible dealings, in the nature of such an Exchange, between arbitrators or their firms on the one hand, and *both* of the parties hereto on the other; take no steps in any tribunal to document its claim of possible bias or attempt to disqualify the arbitrators by application to any Court prior to or during extended hearings; participate in such hearings over a period of eight months; wait until it has lost in the arbitration proceeding and then attempt to have the Courts set aside the award upon the basis of unsubstantiated allegations of possible fraud and prejudice?

Facts

The judgment upon which petitioner seeks review, is bottomed upon an award after arbitration before a Panel of the New York Stock Exchange. The arbitration was held pursuant to the provisions of the Constitution and Rules of the Exchange by which both petitioner and respondent as members of the Exchange had agreed to abide *as well* as upon the written agreement of the parties (3a, 13a).

Petitioner initially moved to vacate the award upon the alleged ground of "undue means" or "evident partiality" (2a).

Not one scintilla of proof of such alleged prejudice was shown by petitioner, who relied in the Courts below, as it does in this application upon innuendoes and vague generalities (6a, R29a).

The names and firm connections of the Panel of Arbitrators were a matter of public record and were well known to petitioner (R6a, R9a, R28a).

After the parties had filed their respective statements of claim, answer and counterclaim, both signed a submission agreement (14a, R30a-36a). Thereafter, and during the last week of February 1968 notice was sent to both parties setting a hearing for March 7th, 1968 (15a). The pamphlet accompanying the notice and received by the parties specifically provided that either party might challenge any arbitrator by written notice to the Arbitration Director. At no time was any such challenge directed to the Arbitration Director (14a, 15a).

At the hearing on March 7th, 1968 petitioner for the first time requested the Arbitrators to in effect, disqualify themselves alleging the size of respondent's firm the fact that the arbitrators did business on the Exchange with respondent's firm and that one of respondent's partners had *at some unnamed time in the past* been a chairman of the Exchange's Board of Governors (5a). The application was denied (6a, 15a). Upon such denial petitioner without further protest or an application to any Court for a stay or for disqualification of the arbitrators proceeded with the arbitration (10a, 15a) from March 7th, 1968 through November 20th, 1968, a period of some eight months. On the latter date the hearings were closed and decision was reserved.

The issue before the arbitrators, on respondent's claim was simple: i.e. whether respondent was entitled to share in the increase in value of his membership and whether he was entitled to have his profits and losses allocated. This was the classic case that constantly comes before the Exchange Arbitration Panels (Respondent's Brief p. 4). It is interesting that on March 7th, 1968 counsel for Wiest

offered to permit petitioner to *withdraw his alleged counterclaim* and proceed thereon in a Court of Law, if so advised, but petitioner did not accept said offer (R23a, R24a).

On December 19th, 1968 a decision was handed down in favor of respondent.* No attempt had been made during this long period of time to withdraw from the arbitration proceeding or to make any application to any State or Federal Court to stay the same or to disqualify the arbitrators for any reason whatsoever. After petitioner found that its defense had been unsuccessful it moved in the District Court to vacate the award alleging the same reasons and the same generalities and innuendoes of bias it had brought up on March 7th, 1968.

By the very nature of the securities business and the membership of individuals and firms who comprise the New York Stock Exchange all members thereof must trade one with the other. This includes petitioner, a member firm of the Exchange, as well as respondent (R22a, R29a, R18a). Petitioner has been a member firm of the New York Stock Exchange since 1950 (R28a). Nowhere in its presentations to the District Court, the Circuit Court or in this Court has petitioner denied respondent's claim, in respect of either of the foregoing. At no time has there been any proof of the slightest bias or prejudice, upon the part of the arbitrators; petitioner relying only upon innuendoes and vague generalties.

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* Although petitioner at page 5 of the petition speaks of a divided vote by the arbitrators there is nothing in the record to show that there was actually a divided vote (R5 respondent's brief, R25a, 26a).

POINT I

The decision of the Circuit Court and of the District Court do not nullify the holding in *Commonwealth Coatings*.

The decision in *Commonwealth Coatings v. Continental Cas. Co.*, 393 U. S. 145 was decided upon the basis of six affirmative and three negative votes.

It involved a situation far different from the case at bar. It dealt with the so-called impartial arbitrator of three arbitrators, one chosen by each side and the third chosen by these two. The third or so-called impartial arbitrator not only failed to disclose that one of the parties had been a regular customer of his *but in addition had been involved in the very projects covered in the arbitration* (opinion of Mr. Justice Black).

Further, the information concerning this so-called impartial arbitrator was unknown to Commonwealth and was not revealed to it by the arbitrator, by the contractor or by anyone else until after the award had been made (R54a).

The concurring opinion of Mr. Justice White in which Mr. Justice Marshall joined, specifically stated that the *decision did not mean that the arbitrators are automatically disqualified by business relationships with the parties, if both parties are informed of the relationship in advance.* Petitioner cannot in the case at bar, deny its knowledge that all of the members of the Exchange necessarily traded one with the other, as well as with the firm of Spear, Leeds & Kellogg of which respondent had become a member. It raised that point at the initial hearing.

Nor can petitioner deny, that Mr. Justice White's statement that he could

> "* * * see no reason * * * to disqualify the best informed and most capable potential arbitrators"

applies with ultimate force to an arbitration between members of the New York Stock Exchange before a Panel of such Exchange.

The statement in the dissenting opinion in which Mr. Justice Harlan and Mr. Justice Stewart joined, wherein Mr. Justice Fortas adopted the finding of the First Circuit Court of Appeals

> "* * * that plaintiff's objections represent a situation where the losing party to an arbitration is now clutching at straws, in an attempt to avoid the results of the arbitration to which it became a party",

is very relevant to the fact situation in this case.

As Judge McGohey in his opinion in the District Court stated

> "The petitioner, although sufficiently informed to be able to do so, chose, for its own reasons not to make any challenge. Now that it has lost in the arbitration, it should not be heard to claim that the arbitrators' conduct denied it the opportunity to make what we find to be a free and informed choice" (10a).

POINT II

There has been no subordination of the relevant statute to the provisions of the Constitution and rules of the Exchange or to the agreement between the parties.

The relevant statute in Section 10 of Title 9 U. S. C. which permits vacating an award

> "b when there was evident partiality or corruption in the arbitrators or either of them"

Certainly, no such partiality or corruption has been shown. The statement of Judge Augustus N. Hand in *Carpineto v. Kiefer*, 187 F. 2d 32 (CCA 2d NY) (p. 10, Respondent's Brief) holding that for an award to be set aside the "corruption, fraud, or undue means" must be "made abundantly clear" is pertinent to the facts herein.

In *L. N. Jackson v. Compania Consolida*, 282 App. Div. 125, 121 N. Y. Supp. 2nd 624 (App. Div. New York Supreme Court First Department 1953), one of the parties had been a member of the New York Produce Exchange. An arbitration before a Panel of that Exchange had been had. The unsuccessful party then raised the question that the President of the unsuccessful claimant was a member of the Board of Governors of the Produce Exchange and that the Board of Governors had selected the Panel of Arbitrators. The Court in refusing to set aside the award pointed out, that the fact, that the claimant was a member of the Exchange had not been concealed, and that earlier contracts between the parties had provided for arbitration by the same Board. It stated that if there had been a false statement or a concealment there might have been a different situation.

The New York State Court of Appeals in the landmark case of *Astoria Medical Group v. Health Insurance Plan*, 11 N. Y. 2nd 128, per Judge Fuld, stated that the parties to an arbitration agreement are completely free to agree upon the identity of the arbitrators and the manner in which they are to be chosen, and that a known interest did not necessarily disqualify the arbitrators if they were chosen because of a particular relationship to the subject matter of a controversy. The Court stated that there must be *some showing* of something *overt* or some *real misconduct* on the part of an arbitrator before an award would be set aside.

In *Sea Coarle Opera Co. v. Conley*, 72 Fed. Supp. 825, affd. 63 F. 2d 310 (D. C. N. Y. and CCA N. Y.), the attorney for one party, challenged the award and admitted that he had learned about facts that might tend to prejudice the arbitrators *at the time of the first hearing*. Judge Leibel in denying the application to set aside the award stated specifically that where a party has knowledge of some bias or prejudice on the part of an arbitrator or facts possibly indicating such bias or prejudice, "he cannot remain silent", go ahead with the hearings and "then later object to the decision * * *".

In June 1969 in a case decided some seven months after the decision in *Commonwealth*, the New York State Appellate Division First Department in *Cushlin v. Bialer*, 32 App. Div. 2nd 217, 301 N. Y. Supp. 2d 181, pointed out, that parties to an agreement were always at liberty to adopt their own method of selecting arbitrators and that Courts must enforce the agreement of the parties.

In *American Silk M Corp. v. Meinhart*, AD , 315 N. Y. Supp. 2d 144 (November 1970), the New York State Appellate Division First Department held:

> "The right to arbitrate in commercial matters depends upon the agreement of the parties, *and it is clear that the parties may engraft conditions thereupon or limit such right*". Emphasis supplied.

In the case at bar not only did the Constitution of the New York Stock Exchange, to which petitioner had subscribed since 1950 when it had become a member firm of the Exchange, mandate arbitration between its members, but the agreement between the parties provided for arbitration before a Panel of Arbitrators of the New York Stock Exchange in accordance with its Constitution and Rules.

Both of the parties hereto by agreeing to be bound by the arbitration proceedings of the Exchange Constitution

and then further binding themselves to the same effect by the partnership agreement must have known that in the ordinary course of business of the Exchange the arbitrators before whom any arbitration would proceed, or their respective firms, would have had to conduct Exchange business with either or both of the parties to any arbitration.

At page 11 of its petition, petitioner refers to the Securities Exchange Act of 1934. A reading of the Act would show that it specifically provides

> "28(b) Nothing in this title shall be construed to modify existing law (1) with regard to the binding effect on any member of any exchange *of any action taken by the authorities of such exchange to settle disputes between its members*, or (2) with regard to the binding effect of such action on any person who has agreed to be bound thereby * * *" Emphasis supplied. 15 U. S. C. Sec. 78bb(b).

The cases cited by petitioner in Points I, II and III are not relevant to the situation in the case at bar. No one disputes that the Exchange's activities must be carried out in accordance with the highest ethical standards (*Silver* v. *New York Stock Exchange*, 373 U. S. 341), or that contracts are controlled by the law in force when they are made (*People ex rel. City of N. Y.* v. *Nixon*, 229 N. Y. 357), or that rights may not be waived if they contravene public policy (*Brooklyn Savings Bank* v. *O'Neill*, 324 U. S. 697). However the holdings in these cases have nothing to do with the issue in the instant case.

The Court of Appeals in the case at bar rightly held that if petitioner's views were to prevail disputes involving larger or specialized firms would be routinely remitted to the Courts (19a).

Even if we assume arguendo that this award were vacated, it would be an exercise in futility. The parties would then have to arbitrate their differences before another Panel of the same Arbitration Board of the Exchange, and the same objections could be raised by petitioner (R29a).

CONCLUSION

The petition is without merit and should be dismissed with costs.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1970

No. 1098

Garfield & Co.,

Petitioner,

—against—

Francis J. Wirst,

Respondent.

BRIEF OF NEW YORK STOCK EXCHANGE AS *AMICUS CURIAE* IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1970

No. 1098

GARFIELD & Co.,

Petitioner,

—against—

FRANCIS J. WIEST,

Respondent.

BRIEF OF NEW YORK STOCK EXCHANGE AS *AMICUS CURIAE* IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief is submitted on behalf of New York Stock Exchange as *amicus curiae* (hereinafter "the Exchange") pursuant to Rule 42 of the Court. It is submitted with the consent of the parties.

The Interest of the Exchange

Although petitioner's contentions are in the form of objections to the arbitrators who rendered the disputed award, in reality they constitute a challenge to any Exchange arbitration and an attack on two vital provisions of the Exchange's Constitution. The first is Article VIII, Section 4, pursuant to which the Board of Arbitration was appointed. It provides:

"Sec. 4. Promptly after the annual election of the Exchange, the Chairman of the Board of Governors

shall appoint, subject to the approval of the Board of Governors, a Board of Arbitration to be composed of fifteen arbitrators selected from members and allied members of the Exchange who are not members of the Board of Governors, to serve at the pleasure of the Board of Governors or until the next annual election of the Exchange and their successors are appointed and take office."

The second provision is Article VIII, Section 5, which provides:

"Sec. 5. Any controversy between parties who are members, allied members, member firms or member corporations shall be submitted for arbitration to five Arbitrators, members of the Board of Arbitration provided for by Section 4 of this Article, and the decision of a majority of such Arbitrators shall be final. All such proceedings shall be held in the City of New York."

It is clear that if petitioner's contentions are valid as a matter of law, the Exchange arbitration system will have been seriously impaired because it is very unlikely that in petitioner's view, any arbitrator or group of arbitrators selected from the Board would be competent to sit in the present case, or, indeed, in any case arising from a dispute involving member organizations of different sizes.

Present federal policy recognizes that Exchange arbitration is an essential component of the regulation of the securities industry under the Securities Exchange Act of 1934. The SEC's 1963 Report of Special Study of Securities Markets (Pt. IV, Ch. 12), for example, pointed out that the process of Exchange arbitration is not only a vital part of the mechanism by which the Exchange regu-

lates the activities of its membership but is also cloaked with additional public importance since disputes between members and non-members, as well as those between members, may be arbitrated. The Special Study found (id. at 561) that during the two years intensively studied:

> "[T]he arbitration director acting for the Exchange performed his ministerial functions without favoring either side and . . . there was no lack of impartiality on the part of the arbitrators."

It is because petitioner's challenge to this group of arbitrators constitutes a challenge to its Constitution and to the procedures established thereunder that the Exchange has submitted this Brief as *amicus curiae*.

ARGUMENT

POINT I

The alleged business relations of which petitioner complains were not such as to warrant disclosure.

The gravamen of petitioner's argument apparently lies in the arbitrators' alleged failure to advise petitioner of the business relationships between them and Spear, Leeds & Kellogg (hereinafter "Spear"). Initially, it should be noted that the kind of business relationships of which petitioner complains would have involved the purchase or sale of securities by one or more of the arbitrators or his or their firms, directly or indirectly, from Spear as specialist. The relationship would arise not through exercise of a choice on the part of the non-specialist member but rather in the usual and unavoidable course of business, *i.e.*, because Spear, in the exercise of its function as a specialist, is responsible for maintaining an inventory of

and market for stocks in which it specializes. Such dealing is not the kind of business relation which—even assuming petitioner's ignorance of specific transactions—gives rise to the appearance of partiality condemned by such cases as *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968).

In the *Commonwealth* case, the Court held that arbitrators must "disclose to the parties any dealings that might create an impression of possible bias." 393 U.S. at 149. Fundamental to the decision was the fact that the critical business relationship was voluntarily undertaken and unknown to one of the litigants.

In the present case the alleged business relations could not reasonably create an impression of possible bias for they would have been inevitable within the framework of the Exchange and obvious to all.

Furthermore, even assuming that the type of possible business relations at issue was embraced by the *Commonwealth* case, petitioner's contention that the arbitrators breached their duty by failing to disclose such relationships must fail as a matter of law because of petitioner's concession (Petition, pp. 4-5) that it knew that such relations existed. Indeed, all Exchange members know two facts when they join the Exchange and unqualifiedly agree to submit all disputes with other members to Exchange arbitration: (1) that business dealings with other members, particularly specialist members, are inevitable in the ordinary conduct of their business and (2) that the volume of such dealings will vary depending upon the size of a particular member. Thus, as petitioner concedes, the business dealings which petitioner seeks to have disclosed must have been, and were, known to petitioner for a substantial period, and there was nothing for the arbitrators to disclose.

Given the circumstances of the well-known and involuntary dealings within the Exchange's system of fixed commissions, it is submitted that it would be unreasonable to hold that because of such dealings, the arbitrators here involved, or the Exchange's Board of Arbitration generally, constituted a group which "might reasonably be thought biased against one litigant and favorable to another." 393 U.S. at 150.

POINT II

The rules established by the Court in commercial arbitration decisions were not intended to be applied in other types of arbitration proceedings, particularly when such proceedings are an essential component of a federally encouraged scheme for industrial self-government.

To apply the doctrine urged by petitioner would unreasonably burden a vital component of the securities industry's supervisory and regulatory system and, therefore, would contravene the public policy of the United States.

The Court has held that arbitration doctrines which are salutary in the field of commercial arbitration should not be uniformly applied to other fields where arbitration is a component of an industry's attempt at self-regulation. In *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) the union had brought a suit to compel arbitration of an alleged grievance. The Supreme Court stated that the federal courts should not hesitate to enforce the use of the arbitration provision in a collective bargaining agreement because federal policy favored industry arbitration in the labor area as distinguished from the general commercial area and added ". . . thus the run

of arbitration cases . . . becomes irrelevant to our problems." 363 U.S. at 578. The Court emphasized that the arbitration of labor disputes " . . . has quite different functions from arbitration under an ordinary commercial agreement" because it plays a vital role in a federally encouraged effort to erect a system of industrial self-government. The Court concluded its analysis with the following quotation from Dean Shulman's study of the arbitration process in the labor field:

> " 'A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties . . . .' " 363 U.S. at 581.

It is clear that under the Securities Exchange Act of 1934 the role of the arbitrator in the securities field is substantially similar in this respect to that of the arbitrator in the labor field. Section 28(b) of the Securities Exchange Act of 1934 provides that nothing in the statute "shall be construed to modify existing law (1) with regard to the binding effect on any member of any exchange of any action taken by the authorities of such exchange to settle disputes between members. . . ." It has been noted by Professor Loss that this provision reflects a Congressional policy favoring arbitration which is apparently based more upon an appreciation of the unique and sensitive nature of dealings between Exchange members than upon arbitration's ordinary advantages of speed and economy. Loss, *Securities Regulation*, p. 1814 fn. 430 (2d ed. 1961). The nature of the securities industry and, indeed, that of the Exchange community, is complex. The arbitration proceedings which are

directed at supervising the actions of a member, allied member, or member organization will often entail questions concerning customs, usages, and procedures, as well as Exchange rules, which are unique to the industry or to the Exchange itself. It is, therefore, particularly appropriate that the arbitration panel which is to hear and determine a case involving a dispute between Exchange members or member organizations be comprised of members or allied members of the Exchange since such persons occupy positions similar to those of the disputants and are knowledgeable concerning the often unique features of the industry in general, and of the Exchange community in particular.

Petitioner's arguments could well sweep away this body of expert decision-makers and thrust upon the courts or laymen the task of deciding often complex and technically difficult issues.

CONCLUSION

As the decision of the Court of Appeals is fully supported by the relevant authorities, public policy and common sense, the petition should be dismissed.

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October Term, 1970

No. 1096

GARFIELD & CO.,

Petitioner,

against

FRANCIS J. WIEST,

Respondent.

PETITIONER'S REPLY BRIEF

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October Term, 1970

No. 1098

GARFIELD & Co.,

Petitioner,

against

FRANCIS J. WIEST,

Respondent.

PETITIONER'S REPLY BRIEF

Respondent's brief in opposition is beside the point. By reason of the business dealings petitioner endeavored to avoid the arbitrators on the only basis available under the Constitution of the Exchange and court decisions then extant; the Court of Appeals held that petitioner "properly and timely raised its objections under the circumstances and the then existing state of the law." (18a).

The real question before the Court is whether it wishes to leave in effect as an authoritative exposition of the Arbitration Act and its own decision in *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968), in that Judicial Circuit in which not only the Exchange is located but which is also the greatest center of trade associations and commercial and maritime arbitration, the following passage in the opinion of the Court of Appeals (18a):

> "We disagree [with petitioner] for we find that such objections [objections to business dealings] were waived in advance by Garfield and by all other members of the Exchange.
>
> "Garfield, when becoming a member firm of the Exchange, agreed to the arbitration of disputes according to the Exchange Constitution and Rules."

Neither respondent nor the Exchange come to grips, in its application to the facts of this case, with the doctrine of *People ex rel. City of New York* v. *Nixon*, 229 N.Y. 357, 361-362, that, "The obligation of a contract is determined by the law in force when it is made . . . Statutes then existing . . . do not change the obligation. They make it what it is." (petition, pages 11-12).

The Exchange argues, in substance, that the application of *Commonwealth Coatings* would wreck a useful system. The experience of the Society of Maritime Arbitrators has been that *Commonwealth Coatings* is invoked only infrequently. The American Arbitration Association had already adopted the doctrine of *Commonwealth Coatings*. If the Exchange system is as useful as claimed we can be confident that, as with the Society of Maritime Arbitrators, *Commonwealth Coatings* will not often be availed of; if it is constantly availed of, we can be sure that the system is not as valuable as the Exchange claims and has been imposed upon a reluctant membership by a powerful hierarchy.

In any event, there are plenty of people in New York who are familiar with the techniques of the Exchange, moreover, from time to time there are disputes such as the present which involve issues of law for which the courts are more suited than boards of arbitration.

CONCLUSION

The Judgment Should Be Reversed.

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